Sureshraj a/l Krishnan v PV Power Engineering Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(W)-138–01 OF 2021
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
2 NOVEMBER 2022

Contract — Agreement — Loan agreement — Whether appellant an unlicensed moneylender — Whether agreement disguised as a contract for private funding — Whether the agreement was illegal moneylending transaction — Whether agreement illegal, void and unenforceable — Whether appellant charged illegal interest — Moneylenders Act 1951

The appellant and the respondents entered into a project support agreement ('PSA') for the funding of a project purportedly awarded to the first respondent. The second respondent who was a director of the first respondent was the guarantor under the PSA. The salient terms of the PSA, inter alia, was that the appellant lent RM500,000 to the first and second respondent as project support sum and the loan was for a period of six months. In the event the respondents breached the PSA, the appellant was entitled to, inter alia: (a) commence legal action for the recovery of RM500,000 and the guaranteed return sum; and (b) claim an interest at the rate of 8% on the total outstanding due and payable on daily basis until the actual full payment of the same. It was the appellant's pleaded case that the respondents had breached the terms of the PSA by failing to pay the RM500,000 within the six months period and only paid RM260,000 guaranteed return sum. Hence, the appellant brought this action against the respondents to enforce the PSA. After this suit was filed, the respondent paid a further sum of RM60,000 to the appellant. The respondents, in their defence, contended that: (i) the appellant was an unlicensed moneylender within the meaning of the Moneylenders Act 1951; (ii) that the PSA was disguised as a contract for private funding support when it was in fact a moneylending agreement; and (iii) the PSA was illegal, void and unenforceable. The respondents counterclaimed for, inter alia, declaratory reliefs to these effects. After a full trial, the High Court held that the PSA was an illegal moneylending transaction, dismissed the appellant's claims and allowed in part the respondents' counterclaim. Both the appellant and the respondents appealed against the decision of the High Court. The respondents' appeal was against the dismissal of the respondents' counterclaim in prayer 13(f) and (g), ie their claim for the refund of the sum of RM562,900 allegedly repaid by the respondents to the appellant together with interest. The issues that arose for determination were: (1) whether the High Court judge ('HCJ')

A erred in concluding that the PSA was an illegal money lending transaction; and (2) whether the HCJ erred in law and in fact in concluding that the appellant was charging illegal interest.

Held, allowing the appellant's appeal and dismissing the respondents' appeal:

B (1) The parties who alleged the appellant was a moneylender were the respondents. Therefore, the burden of proving that the appellant was a moneylender fell on the respondents. On this issue, the respondents were making a bare allegation. There was no evidence adduced by the respondents to prove that the appellant had carried on or advertised or announced himself or held himself as carrying the business of moneylending as a moneylender. The fact that the appellant lent money to the respondents did not make him a moneylender. Based on the facts and circumstances of this case, the respondents had failed to prove that the appellant was a moneylender as defined in s 2 of the Moneylenders Act 1951. Consequently, HCJ had erred in law and in fact when she refused to consider the submission put forth by the appellant on s 2 of the Moneylenders Act and failed to make a finding that the appellant was not a moneylender. For the same reason, the HCJ erred in concluding the PSA to be an unlicensed moneylending transaction. Since the appellant was not a moneylender, the net effects were: (a) the presumption under s 10OA of the Moneylenders Act 1951 had been rebutted; and (b) the PSA was in reality a friendly loan agreement not disguised as a contract for private funding support (see paras 38 & 42–44).

F (2) Clause 7 of the PSA imposed 8% interest per day on the outstanding sum. 8% interest per day was not only exorbitant, but obviously was wrong. No court of law would allow such a claim. Realising the mistake, during the trial, the appellant dropped his claim for the 8% interest and instead, claimed for interest of 5%pa. The appellant had the right to abandon his claim on the 8% interest at any stage of the proceeding on the ground of mistake. It made no difference whether the claim was pleaded in the statement of claim and later withdrawn or the claim was not pleaded at all. The court should not penalise the appellant for making a wrong claim which was later rectified. Therefore, the HCJ erred in law and in fact in concluding that as long as prayer 12(d) on the 8% interest remained in the statement of claim, it meant the appellant was charging illegal interest. Consequent to the appellant dropping his claim on interest of 8% per day, cl 7 of the PSA was severed from the agreement. With the exclusion of cl 7, the PSA was a friendly loan simpliciter (see paras 46 & 48–49).

[Bahasa Malaysia summary

Perayu dan responden-responden ('responden') memeterai perjanjian sokongan projek ('PSA') bagi pembiayaan projek yang diberikan kepada

responden pertama. Responden kedua yang merupakan pengarah responden pertama merupakan penjamin di bawah PSA. Syarat penting PSA, antara lain, ialah perayu meminjamkan RM500,000 kepada responden pertama dan kedua sebagai jumlah sokongan projek dan pinjaman itu adalah untuk tempoh enam bulan. Sekiranya responden melanggar PSA tersebut, perayu berhak, antara lain: (a) memfailkan tindakan undang-undang untuk mendapatkan semula RM500,000 dan jumlah pulangan yang dijamin; dan (b) menuntut faedah pada kadar 8% ke atas jumlah tertunggak yang perlu dibayar setiap hari sehingga pembayaran penuh. Perayu mengaku bahawa responden telah melanggar syarat PSA dengan gagal membayar RM500,000 dalam tempoh enam bulan dan hanya membayar RM260,000 untuk jumlah pulangan yang dijamin. Oleh itu, perayu mengambil tindakan ini terhadap responden untuk menguatkuasakan PSA tersebut. Selepas saman itu difailkan, responden membayar sejumlah RM60,000 lagi kepada perayu. Responden, dalam pembelaan mereka, berhujah bahawa: (i) perayu adalah pemberi pinjam wang tidak berlesen menurut peruntukan Akta Pemberi Pinjam Wang 1951; (ii) bahawa PSA tersebut dianggap secara salah sebagai kontrak untuk sokongan pembiayaan swasta sedangkan ianya sebenarnya perjanjian pemberi pinjam wang; dan (iii) PSA adalah tidak sah menurut undang-undang dan tidak boleh dikuatkuasakan. Responden menuntut ganti rugi, antara lain, relif pengisytiharan terhadap alasan-alasan di atas. Selepas perbicaraan penuh, Mahkamah Tinggi memutuskan bahawa PSA tersebut merupakan transaksi pinjaman wang haram, menolak tuntutan perayu dan membenarkan sebahagian tuntutan balas responden. Kedua-dua perayu dan responden merayu terhadap keputusan Mahkamah Tinggi tersebut. Rayuan responden adalah terhadap penolakan tuntutan balas responden dalam *prayer* 13(f) dan (g), iaitu tuntutan mereka untuk pemulangan semula jumlah RM562,900 yang didakwa dibayar balik oleh responden kepada perayu dengan faedah. Isu-isu yang timbul untuk penentuan adalah: (1) sama ada hakim Mahkamah Tinggi ('HMT') terkhilaf dalam membuat kesimpulan bahawa PSA tersebut adalah transaksi pinjaman wang secara haram; dan (2) sama ada HMT telah terkhilaf dari segi undang-undang dan fakta ketika membuat kesimpulan bahawa perayu telah mengenakan kadar faedah yang tidak dibenarkan menurut undang-undang.

Diputuskan, membenarkan rayuan perayu dan menolak rayuan responden:

(1) Pihak-pihak yang mendakwa perayu adalah peminjam wang adalah responden. Oleh itu, beban untuk membuktikan bahawa perayu adalah peminjam wang adalah pada responden. Mengenai isu ini, responden telah membuat tuduhan yang tidak berasas. Tiada bukti yang dikemukakan oleh responden untuk membuktikan bahawa perayu telah meneruskan atau mengiklankan atau mengumumkan dirinya sebagai menjalankan perniagaan pinjaman wang atau sebagai peminjam wang. Fakta bahawa perayu meminjamkan wang kepada responden tidak

menjadikannya peminjam wang. Berdasarkan fakta dan keadaan kes ini, responden telah gagal membuktikan bahawa perayu adalah peminjam wang seperti yang ditakrifkan di dalam perkara 2 Akta Pemberi Pinjam Wang 1951. Oleh itu, HMT telah terkhilaf dari segi undang-undang dan fakta apabila tidak mempertimbangkan hujahan oleh perayu mengenai s 2 Akta Pemberi Pinjam Wang dan gagal membuat dapatan bahawa perayu bukanlah peminjam wang. Atas sebab yang sama, HMT terkhilaf dalam menyimpulkan PSA tersebut sebagai transaksi pinjaman wang tidak berlesen. Oleh kerana perayu bukan peminjam wang, kesannya ialah: (a) anggapan di bawah s 100A Akta Pemberi Pinjam Wang 1951 telah ditolak; dan (b) PSA tersebut merupakan perjanjian pinjaman mesra ('friendly loan') yang tidak disalahanggap sebagai kontrak, iaitu satu pembiayaan peribadi (lihat perenggan 38 & 42–44).

(2) Klausa 7 PSA mengenakan faedah 8% sehari ke atas jumlah tertunggak. Faedah 8% setiap hari bukan sahaja terlalu tinggi, juga ianya adalah jelas salah. Tiada mahkamah akan membenarkan tuntutan sedemikian. Menyedari kesilapan tersebut, semasa perbicaraan, perayu mengenepikan tuntutannya untuk faedah 8% dan sebaliknya, menuntut faedah 5%pa. Perayu mempunyai hak untuk mengenepikan tuntutannya atas faedah 8% di mana-mana peringkat prosiding atas alasan kesilapan. Ianya tidak membezakan sama ada tuntutan itu telah dituntut di dalam penyataan tuntutan dan kemudian ditarik balik atau tuntutan itu tidak dituntut sama sekali. Mahkamah tidak boleh menghukum perayu kerana membuat tuntutan yang salah yang kemudiannya telah diperbetulkan. Oleh itu, HMT telah terkhilaf dari segi undang-undang dan fakta dalam membuat kesimpulan bahawa selagi *prayer* 12(d) atas faedah 8% kekal di dalam pernyataan tuntutan, ia bermakna perayu telah menuntut kadar faedah yang bercanggah dengan undang-undang. Berikutan itu, perayu telah mengenepikan tuntutannya untuk faedah 8% sehari, yang mana klausa 7 PSA tersebut telah dibuang. Dengan pengecualian klausa 7, PSA tersebut adalah jelas merupakan pinjaman mesra ('friendly loan') (lihat perenggan 46 & 48–49).]

Cases referred to

Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 MLJ 333, CA (refd)

Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9; [1979] 1 LNS 60, FC (refd)

Patel v Mirza [2017] 1 All ER 191, SC (refd)

Tan Aik Teck v Tang Soon Chye [2007] 6 MLJ 97; [2007] 5 CLJ 441, CA (refd)

Wong Kim Fatt v Yong Kwet Yin [1996] 1 MLJ 45, HC (refd)

Legislation referred to

Evidence Act 1950 s 90A
Moneylenders Act 1951 ss 2, 10OA

Appeal from: *Sureshraj a/l Krishnan v PV Power Engineering Sdn Bhd & Ors* [2021] MLJU 2504 (High Court, Shah Alam)

NV Sree Harry (with Mahendra Mahason, Enoveetha Bhaskaran and Tanisha Sree Harry) (Sree Harry & Co) for the appellant.
Adi Radlan bin Abdul Rahman (with Syed Faisal Al-Edros bin Syed Abdullah) (Adi Radlan & Co) for the respondents.

Hadhariah Syed Ismail JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant who is the plaintiff in the original suit is the lender in a loan transaction. The respondents ('defendants') are the borrowers. The loan transaction was put into writing entitled 'project support agreement' .

[2] The respondents ('defendants') defaulted in their repayment of the sum loaned by the appellant. The appellant brought this action against the respondents to enforce the project support agreement.

[3] In their re-amended statement of defence, the respondents alleged: (i) the appellant is an unlicensed moneylender within the meaning of the Moneylenders Act 1951; (ii) that the project support agreement dated 25 July 2016 is disguised as a contract for private funding support when it is in fact a moneylending agreement; and (iii) the project support agreement dated 25 July 2016 is illegal, void and unenforceable. The respondents counterclaims for, inter alia, declaratory reliefs to these effects.

[4] After a full trial, the High Court held that the project support agreement dated 25 July 2016 is an illegal moneylending transaction. The court dismissed the appellant's claims and allowed in part the respondents' counterclaim.

[5] Both the appellant and the respondents appealed against the decision of the High Court. The respondents' appeal registered as No B-02(NCC)-182–01 of 2021 is against the dismissal of the respondents' counterclaim in prayer 13(f) and (g), ie their claim for the refund of the sum of RM562,900 allegedly repaid by the respondents to the appellant together with interest.

[6] Both appeals came up for hearing before us on 19 July 2022. On the same date, we unanimously allow the appellant's appeal and dismiss the respondents' appeal.

[7] This judgment is confined to the appellant's claim only as the respondents did not apply for leave to appeal to the Federal Court against our decision to dismiss their appeal on the counterclaim.

[8] The issues raised in this appeal are: (i) whether or not the project support agreement dated 25 July 2016 is a moneylending transaction that contravenes the Moneylenders Act 1951; (ii) even if the project support agreement is a moneylending transaction, what is the just and fair and appropriate order that the learned High Court judge ought to have made in this case; and (iii) whether the learned High Court judge had erred when she wrongfully excluded material evidence namely the Whatsapp Messages (ID1).

BACKGROUND FACTS

[9] On 25 July 2016, the appellant and the respondents entered into a project support agreement ('PSA') for the funding of a project involving civil, mechanical and electrical facilities for PULADA (*Pusat Latihan Tempur Tentera Darat*) purportedly awarded to the first respondent ('Pulada project'). The second respondent who is a director of the first respondent was the guarantor under the PSA.

[10] The salient terms of the PSA are as follows:

(a) the appellant lent RM500,000 to the first and second respondent as project support sum and the loan is for a period of six months from 25 July 2016 to 24 January 2017;

(b) the first respondent must pay guaranteed return sum of RM35,000 per month throughout the six months loan term;

(c) the first and second respondent must repay the project support sum no matter what happen to the Pulada project;

(d) the first respondent shall issue letter of appointment to the appellant appointing him as project administrator to manage the first and second respondent's accounts for the Pulada project from 25 July 2016 to 24 January 2017;

(e) as security for the repayment of RM500,000 and the guaranteed return sum, the second respondent shall also allow the appellant to enter a private caveat on the property belonging to the second respondent and one Norsiati bt Mohamad Noor (the second respondent's wife). The

property being a double storey terrace house bearing postal address No 7065, Jalan Sri Putri 14, Taman Putri Kulai, 81000 Kulai Johor ('the property').

(f) in the event the respondents breached the PSA, the appellant is entitled to take the following remedial measures against the respondents:

(i) commence legal action for the recovery of RM500,000 and the guaranteed return sum;

(ii) foreclose, sell and/or auction the property;

(iii) demand for the handover and/or gain possession of the property; and

(iv) claim an interest at the rate of 8% on the total outstanding due and payable on daily basis until the actual full payment of the same.

[11] The first respondent did issue a letter of appointment dated 25 July 2016 to the appellant, appointing him as the project/finance manager of the Pulada project commencing from the date of the PSA with a monthly salary of RM5,000 for the period of six months. The appointment letter also provides for the payment of 10% of the profits generated before tax upon completion of the said project.

[12] It is the appellant's pleaded case that the respondents had breached the terms of the PSA by failing to pay the RM500,000 within the six months period and only paid RM260,000 guaranteed return sum. After this suit was filed, the respondent paid a further sum of RM60,000 to the appellant.

THE APPELLANT'S CLAIM

[13] At para 12 of the statement of claim, the appellant prayed for the following reliefs:

(a) the project support sum lent in the sum of RM500,000;

(b) guaranteed return sum amounting to RM545,000 as at June 2018;

(c) guaranteed return sum of RM35,000 per month from July 2018 till full realisation;

(d) interest at the rate of 8% per day on item (a), (b) and (c) above from the date of breach of the contract till full realisation;

(e) in the alternative to (d) above, interest of 5%pa on items (a), (b) and (c) from the date of filing of this summons till full realisation;

(f) cost on solicitor-client basis;

(g) costs of this action; and

(h) any other relief deems fit and proper by the court.

THE RESPONDENTS' COUNTERCLAIM

[14] At para 13 of the re-amended defence and counterclaim, the respondents sought the following reliefs:

(a) a declaration that the appellant is an unlicensed money lender within the meaning of Moneylenders Act 1951;

(b) a declaration that the project support agreement is an unlicensed money lending agreement and is void, illegal and unenforceable against the respondents;

(c) removal of the private caveat entered by the appellant on 28 July 2016 against the second respondent's property;

(d) damages for wrongful entry of the said caveat to be assessed by the Registrar;

(e) injunction to restrain the appellant from selling or auctioning the double storey terrace house bearing postal address No 7065, Jalan Sri Putri 14, Taman Putri, 81000 Kulai Jaya, Johor;

(f) the sum of RM562,900 that has been repaid by the respondents to the appellant to be refunded to the respondents;

(g) interest on the said RM562,900 from 25 July 2016 till full realisation; and

(h) costs.

Amount of money lent and repaid

[15] At the High Court, the appellant said he lent RM500,000 to the respondents by way of cash RM70,000 handed personally to the second respondent on 25 July 2016 and the balance RM430,000 was credited into the respondents' bank account on two occasions. First, he credited RM300,000 into the respondents' bank account on 25 July 2016 and later, on 29 July 2016, he credited the sum of RM130,000 into the respondents' bank account. On the other hand, the second respondent ('DW1') testified that the respondents only received RM430,000 from the appellant. The High Court found the appellant has failed to prove the cash payment of RM70,000. Thus, the High Court rightly held that the appellant lent RM430,000 only to the respondents.

[16] With regard to repayment of the loan, the respondents have pleaded in para 6 of their re-amended defence that they have repaid to the appellant a sum

of RM562,900 under the PSA. This fact is denied by the appellant. Instead, the appellant admitted he has received a sum of RM260,000 from the respondents prior to the filing of this suit as pleaded in para 7 of the statement of claim and another payment in the sum of RM60,000 was received from the respondents after this suit was filed. Thus, the appellant admitted he has received the sum of RM320,000 from the respondents as repayments under the PSA.

[17] It is the appellant's evidence that the payments mentioned in para 6 of the respondents re-amended defence refer to payments for another project (not Pulada project) funded by the appellant to the respondents.

[18] In reply to para 6 of the re-amended defence, the appellant explains the payments he received as follows:

(a) item (1) ie RM10,000 is payment of two months salary to the appellant as finance manager of the Pulada project and no relation to the project support sum;

(b) item (2), (3) and (4) ie RM35,000, RM35,000 and RM35,000 respectively is admitted as payments of guaranteed return sum;

(c) item (5), (6) and (7) ie RM49,900, RM100 and RM49,900 respectively is not within the appellant's knowledge. The respondents is put under strict proof;

(d) item (8) ie RM35,000 is admitted as payment of guaranteed return sum;

(e) item (9) RM30,000 is repayment for a soft loan to the second respondent for project 'Kerja Senggaraan Sivil, Mekanikal Dan Elektrikal Fasalitas Infra Latihan, Rkat Desa Pulada Dan Infra Mekanikal Pusat Latihan Tempur Tentera Darat ('PULADA'). This loan was repaid via third party cheque. Therefore, this payment (RM30,000) has no relation to project support sum;

(f) item (10) ie RM100,000 is admitted as payment of guaranteed return sum;

(g) item (11) ie RM50,000 is payment for a soft loan taken by the second respondent to obtain a tender for project 'Cadangan untuk Penempatan Semula Penduduk Kg Senibong yang mengandungi 100 Unit Rumah Teres 2 Tingkat (18' x 65') beserta dan Kemudahan-Kemudahan lain diatas sebahagian Lot PTD 194795, Mukim Plentong, Johor'. The loan was repaid within a month after the respondents obtained the project. Therefore, this payment of RM50,000 has no relation to the project support sum;

(h) item (12) ie RM53,000 (loan of RM50,000 refunded with 6% GST of RM3,000) is repayment for advance payment made by the appellant to

Malaysia Airports Holdings Bhd for the second respondent via a bank draft to obtain a tender project of Malaysia Airports Holdings Bhd. So, this payment has no relation to the project support sum;

(i) item (13) ie RM20,000 is admitted as payment of guaranteed return sum; and

(j) item (14) ie RM60,000 is admitted as payment of guaranteed return sum made on 26 July 2019 after the filing of this suit on 25 July 2018.

[19] Based on the appellant's admission that he only received payments of RM320,000 from the respondents, there is a balance sum of RM110,000 due and owing by the respondents to the appellant.

PROCEEDINGS AT THE HIGH COURT

[20] It is not in dispute that the appellant and the second respondent are friends. The PSA came about when the second respondent approached the appellant and showed him a letter of offer dated 21 November 2015 from PULADA awarding the Pulada project to the respondents. The second respondent told the appellant the Pulada project is worth RM2.5m and that the project could bring a profit of between RM1.5m to RM1.8m within six months.

[21] The problem was the respondents did not have funds to start the project. By showing the offer letter from PULADA, the second respondent convinced the appellant that the respondents had a genuine project and asked the appellant to give him RM500,000.

[22] RM500,000 is an awful lot of money to part with. In anticipation of getting payments from the project, the respondents agreed to the terms contained in the PSA without any qualm. In fact, the second respondent admitted he would pay the appellant in accordance with the terms of the PSA had the respondents gotten payments from the project.

[23] However, the respondents did not get any payments from the Pulada project. The respondents contended that they were cheated in the Pulada project. Consequently, the respondents could not honour the PSA.

[24] On 25 July 2018, the appellant brought this action against the respondents to enforce the PSA. In summary, the appellant's case is simply this. He lends money to the respondent as project support sum and investment. To him, the PSA is a normal contract. That his investment is risk free with guaranteed return sum. That the respondents were fully aware and understood the consequences of the PSA. That before the filing of this suit, the respondents

never raised any issue on the legality of the PSA. It is only after the respondents were sued and upon being advised by their lawyer, that the respondents now say the PSA is an illegal moneylending.

[25] The respondents' case is the appellant is an unlicensed moneylender and loan shark who is in the business of moneylending. They maintain their position that the PSA is a moneylending contract and is illegal for being in contravention of the Moneylenders Act 1951 ('the MLA') because not only the appellant charged interest of 8% per day, but for the loan of RM500,000, the respondents are required to repay three times more than the principal sum.

[26] After hearing the evidence of the appellant ('SP1') and the second respondent ('DW1'), the High Court identified the issues for determination as follows:

(i) whether the PSA dated 25 July 2016 was in actual fact a moneylending agreement and thus contravening the Moneylenders Act 1951;

(ii) whether the presumption pursuant to s 10OA of the Moneylenders Act 1951 has been invoked;

(iii) whether the plaintiff has rebutted the presumption;

(iv) whether the Whatsapp Messages, ID1 can be admitted in evidence; and

(v) whether the defendants can claim for restitution from the plaintiff.

[27] The learned judge dealt with issue (i), (ii) and (iii) first. Looking at the terms of the PSA which contain elements of moneylending ingredients in that the money lent to the respondents carried interest of 8% per day and returns in massive proportion, the court agrees with the respondents that the presumption under s 10OA of the MLA applies against the appellant. Section 10OA of the MLA 1951 reads as follows:

> Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.

[28] With the presumption being invoked against the appellant, the appellant has the evidential burden to rebut the presumption on a balance of probabilities.

[29] In his rebuttal evidence, the appellant denied he was a moneylender. He referred to the money he lent to the respondents as 'funding support' and 'investment'. He contended that his investments with the respondents were risk free and that he would be guaranteed a profit whether or not the

respondents made their profits. That the money he lent to the respondents is not moneylending as alleged by the respondents. The appellant also informed the court that he was dropping his claim for interest of 8% per day because he realised this claim is a mistake. Instead, he is now claiming for the return of the principal sum only with interest of 5%pa.

[30] When cross-examined by counsel for the respondents as to why he says he was not an unlicensed moneylender, the appellant's reply was as follows:

> Q: ... You've testified that you are an accountant. How does being an accountant disqualify you from being an unlicensed moneylender?
>
> A: Sorry, I don't quite understand the question.
>
> Q: You deny being an unlicensed moneylender?
>
> A: Yes
>
> Q: You deny it because you say you're an accountant?
>
> A: OK
>
> Q: How is it that just because you are an accountant, you cannot be an unlicensed moneylender?
>
> A: I don't quite understand.
>
> Q: Someone can be an accountant and can also be an unlicensed moneylender, would you agree?
>
> A: How can it be unlicensed moneylender, I don't quite understand.

[31] The appellant's answers to the above questions show he was unable to explain why being an accountant, he cannot be an unlicensed moneylender too. His answers did not sit well with the learned judge. For this reason, the learned judge found that the appellant's denial that he was a moneylender was uninspiring and did not convince the court that he was telling the truth. The court rejected the appellant's counsel submission that the appellant did not reply satisfactorily to the questions put to him because he could not understand counsel.

[32] We, however noted that the learned judge did not make a finding whether the appellant is a moneylender or not.

[33] Upon analysing the appellant's evidence, the learned judge concluded that the appellant had failed to rebut the presumption under s 10OA of the MLA 1951 on the balance of probabilities. This is what Her Ladyship said at para [114] of her judgment:

> [114] I find as a fact that the plaintiff has failed to rebut the presumption placed on him via s 10OA of the MLA on a balance of probabilities. Pursuant to s 10OA of the MLA, proof of a single loan at interest made by a party shall raises the presumption that he is in the business of moneylending. Contrary to the contention put forth,

> the need to show that the person carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending does not apply to this situation and is thus inconsequential. Accordingly, I hold that the plaintiff has failed to discharge the legal and evidential burden to prove on a balance of probabilities against the defendants. I find that the PSA was a disguise. What it concealed was moneylending transaction couched in terms of a seemingly innocuous funding support agreement.

[34] The High Court followed the Court of Appeal decision in the case of *Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd* [2020] 6 MLJ 333. In that case, it is not disputed that the plaintiff does not have a moneylending licence. The court held even though the plaintiff makes a single loan transaction with interest charged, it triggered the presumption in s 10OA of the Moneylenders Act 1951 that it is a moneylending transaction.

[35] With regard to issue (iv) on the admissibility of the Whatsapp Messages (ID1), the learned judge held ID1 is not admissible in evidence as the appellant did not fully comply with the requirements of s 90A of the Evidence Act 1950.

[36] With regard to issue (v), namely the respondents' claim for restitution, the learned judge dismissed the respondents' counterclaim on the ground the second respondent is not a victim but a shrewd businessman who knew what he had gotten himself into. The judge opined that probably the lure of making large profits from the Pulada project had spurred him to throw caution to the wind and accept the terms spelt out in the PSA even though the terms were terribly one sided. We agree with the finding of fact made by the learned judge on this issue.

OUR DECISION

[37] Section 2 of the Moneylenders Act 1951 defined 'moneylender' as follows:

> 'moneylender' means any person who carries on or advertised or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business.

[38] The parties who alleges the appellant is a moneylender are the respondents. Therefore, the burden of proving the appellant is a moneylender falls on the respondents. On this issue, we find the respondents were making a bare allegation. There was no evidence adduced by the respondents to prove that the appellant had carried on or advertised or announced himself or held himself as carrying the business of moneylending as a moneylender. The fact that the appellant lent money to the respondents does not make him a moneylender. We find support in the following cases.

[39] In *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9; [1979] 1 LNS 60, the Federal Court held:

> At the outset we wish to observe that the Moneylenders Ordinance 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is a moneylending transaction of a moneylender which is the subject matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondent and the client are moneylending transactions, the respondent must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. He is a moneylender if within the meaning of s 2 of the Ordinance, he can be said to be a person 'whose business is that of moneylending'. To prove business requires some sort of continuity or system or repetition of similar transactions (*Chow Yoong Hong v Choong Fah Rubber Manufacturer* [1962] AC 209 at 218; [1962] MLJ 74).

[40] In *Wong Kim Fatt v Yong Kwet Yin* [1996] 1 MLJ 45, the appellant, a lawyer gave two personal loans to the respondent. In a claim by the appellant to recover the loaned sums, the respondent argued the appellant is a moneylender and the loans transactions are moneylending without licence. It was further argued that the previous transactions where money passed from the appellant to the respondent show there was a semblance of system and continuity about these transactions. Justice Abdul Malik Ishak J rejected the respondent's argument and held:

> 1. From the affidavit evidence, it was clear that the appellant did not advertise or held himself out in any way as a moneylender as defined by s 2 of the Act. The allegation of moneylending was merely a bare allegation which was unsupported by any concrete evidence ...
>
> 2. A simple personal loan cannot be construed under the law to be a moneylending transaction. As Farwell J said in *Litchfield v Dreyfus* [1906] KB 584, particularly at p 590:
>
> > The Act was intended to apply only to persons who are really carrying on the business of moneylending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called moneylenders as an offensive term. Moneylending is a perfectly respectable form of business. Nobody says that bankers are rascals because they lend money.
>
> 3. The appellant gave only two personal loans to the respondent, and it could not be argued that these two isolated personal loan transactions could be construed as evidence of 'system and continuity' of a moneylending business (see p 54D); *Newton v Pyke* (1908) 25 TLR 127 and *Baju Ria v Liau Kim Lian* [1995] 1 MLJ 128 distinguished.

[41] In the present case, it is an undisputed fact that the appellant had to obtain funds from his relative to help the second respondent. Even though the appellant has testified that some of the repayments made by the respondents are repayments for the respondents' other projects funded by the appellant, in our view, the previous loans are also personal loans given when the respondents required monetary assistance from the appellant. There was no evidence that the appellant gave loan to other people apart from the respondent.

[42] Based on the facts and circumstances of this case, we find the respondents have failed to prove that the appellant was a moneylender as defined in s 2 of the Moneylenders Act 1951.

[43] Consequently, we find the learned judge had erred in law and in fact when she refused to consider the submission put forth by the appellant on s 2 of the Moneylenders Act and failed to make a finding that the appellant is not a moneylender. For the same reason, we also find the learned judge erred in concluding the PSA to be an unlicensed moneylending transaction.

[44] Since it is our finding that the appellant is not a moneylender, the net effects are: (i) the presumption under s 10OA of the Moneylenders Act 1951 has been rebutted; and (ii) the PSA was in reality a friendly loan agreement not disguised as a contract for private funding support.

[45] The meaning of friendly loan can be found in the case of *Tan Aik Teck v Tang Soon Chye* [2007] 6 MLJ 97; [2007] 5 CLJ 441, where Mokhtar Sidin JCA states:

> A friendly loan is opposed to the normal borrowing from a moneylender or financial institution, A friendly loan is a loan between two persons based on trust. There may be an agreement such as an IOU or security pledged to repayment but most important there will be no interest imposed.

[46] In the present case, it is not in dispute that cl 7 of the PSA imposed 8% interest per day on the outstanding sum. The appellant's claim for this exact interest is pleaded in prayer 12(d) of the statement of claim. There is no denial that the 8% interest per day is not only exorbitant, but obviously is wrong. No court of law would allow such a claim. Realising the mistake, during the trial, the appellant told the court that he was dropping his claim in prayer 12(d). Instead, the appellant claimed for interest of 5%pa.

[47] The learned judge did not state whether the 8% interest per day remains a live issue. Instead the learned judge said at para [95] of the judgment as follows:

A [95] It was observed that the plaintiff attempted to charge interest at 8% per day on the outstanding sum. Although he told the court that he was dropping that claim when cross-examined it still did not do his credibility any favour. It would have given a better impression if the plaintiff had entirely excluded this prayer from his claim in the statement of claim in the first place. By maintaining that exorbitant B claim in the SOC only sealed the court's conviction that he was charging illegal interest.

[48] We disagree with the learned judge's reasoning in para [95] above. In our view, the appellant had the right to abandon his claim on the 8% interest C at any stage of the proceeding on the ground of mistake. It makes no difference whether the claim is pleaded in the statement of claim and withdrawn later or the claim is not pleaded at all. The end result is the same, ie, the appellant does not wish to pursue the claim anymore. After all, there is no rule of law that says one should not plead a claim only to withdraw it later. The court always adopts D a flexible approach. Not a strict rule. And the court would generally allow a party's application to withdraw their claim unless it is an abuse of process. Once the court allows the application, the claim is considered to no longer existing or to be in issue. The court should not penalised the appellant for making a wrong claim which is later rectified. Therefore, it is our considered view that the E learned judge erred in law and in fact when Her Ladyship concluded as long as prayer 12(d) remains in the statement of claim, it means the appellant is charging illegal interest.

F **[49]** Consequent to the appellant's dropping his claim on interest of 8% per day, cl 7 of the PSA is severed from the agreement. With the exclusion of cl 7, the PSA is a friendly loan simpliciter as defined in the case of *Tan Aik Teck v Tang Soon Chye* [2007] 6 MLJ 97; [2007] 5 CLJ 441. In his evidence, the appellant said that all he asked for from the court is for the respondents to repay G him the principal sum he loaned. He is not claiming for the guaranteed return sum. In this case, the sum loaned was RM430,000. The sum repaid is RM320,000. Thus, he is claiming for the return of the balance sum of RM110,000.

H **[50]** In view of our finding that the PSA is a friendly loan, there is no necessity for us to consider the issue of admissibility of Whatsapp Messages (ID1) and the applicability of the law propounded in *Patel v Mirza* [2017] 1 All ER 191.

I **[51]** For the aforesaid reasons, we allow the appellant's appeal and set aside the decision of the High Court in respect of the appellant's claim. We enter judgment for the appellant for the sum of RM110,000 with interest of 5%pa

from the date of filing of the writ on 25 July 2018 till satisfaction. We also order the respondents to pay costs of RM35,000 here and below to the appellant subject to allocator.

Appellant's appeal allowed with costs, respondents' appeal dismissed.

Reported by K Selvaraju